

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DEBRA K. DOYLE,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
DA0752920414I1

DATE: JAN 0 8 1993

Malinda A. Gaul, Esquire, Kosub & Gaul, San Antonio,
Texas.

Ronald E. Gale, Randolph Air Force Base, Texas, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The agency petitions for review of the August 24, 1992 initial decision that reversed the appellant's removal. For the reasons discussed below, we DISMISS the agency's petition for failure to comply with the Board's interim relief regulations. We also DISMISS the appellant's petition for enforcement of the administrative judge's interim relief order.

BACKGROUND

The agency removed the appellant from her position of GS-11 Public Affairs Specialist, effective April 10, 1992. In an August 24, 1992 initial decision, the administrative judge did not sustain the removal action, finding that the agency did not prove its charge that the appellant was medically disqualified from performing her duties. The administrative judge ordered the agency to provide the appellant with interim relief if it filed a petition for review.

With its petition for review, the agency submits a "Declaration of Compliance" from Lt. Col. Robert A. Brus, the appellant's immediate supervisor. See Petition for Review File, Tab 1 at 4. Lt. Col. Brus states that: 1) the appellant has been placed in a leave without pay (LWOP) status effective August 24, 1992; 2) the medical documentation the appellant had previously supplied did not establish that she was able to work; 3) the appellant would be returned to work when the agency received documentation that she was ready, willing, and able to work, and 4) when the agency received such documentation, the appellant's "back pay entitlements" would be calculated. *Id.*

With the declaration, the agency submits a Notification of Personnel Action (SF-50) showing that the appellant was given an interim appointment to her Public Affairs Specialist position, effective August 24, 1992. See Petition for Review File, Tab 1 at 5. The agency also submits an April 7, 1992 medical report for the appellant, see Petition for Review

File, Tab 1 at 6-11, and correspondence between the agency and the appellant. See Petition for Review File, Tab 1 at 12-14. In the correspondence, the agency requested medical information and a personal statement from the appellant, and the appellant's attorney advised the agency that all issues regarding the appellant's ability to work had been resolved in the initial decision. *Id.*

The appellant has also filed a response to the petition for review, and a petition for enforcement of the interim relief order. See Petition for Review File, Tabs 3 and 4. The agency has responded to the petition for enforcement. See Petition for Review File, Tab 5.

ANALYSIS

A motion to dismiss the petition for review is the exclusive remedy available to an appellant who claims that the agency has not properly effected interim relief. See *Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62, 68 n. 4 (1992). Therefore, we dismiss the appellant's petition for enforcement, and will not consider the agency's response to it. See *McLaughlin v. U.S. Postal Service*, MSPB Docket No. BN07529010188, slip op. at 6 (Aug. 18, 1992).

Nevertheless, an agency's failure to provide evidence of compliance with an interim relief order will result in the dismissal of its petition for review. See *Wallace v. U.S. Postal Service*, 48 M.S.P.R. 270 (1991). Here, the agency has failed to provide evidence showing that it paid the appellant from the date of issuance of the initial decision, as it was

required to do by the interim relief order. See Initial Decision at 15. By demanding that the appellant submit medical and other information before paying her, the agency is attempting to reopen the issue of whether the appellant is medically disqualified from working. As this information is not necessary to a determination of whether the appellant should be paid, the agency is not in compliance with the interim relief order.¹ See *Mascarenas v. Department of Defense*, 54 M.S.P.R. 303, 308 (1992) (Because outside earnings are not deducted from interim relief, the agency was not in compliance with an order for interim relief when it sought information regarding outside earnings from the employee).

The agency's petition for review must be dismissed, as it has failed to provide evidence of complete interim relief.² See *Schulte v. Department of the Air Force*, 50 M.S.P.R. 126, 129 (1991).

ORDER

We ORDER the agency to cancel the appellant's removal and to restore the appellant effective April 10, 1992. See

¹ We note that if the agency had determined that the appellant's return to the work environment would be unduly disruptive, it could have chosen not to return her to duty, but would have still been required to provide her with "pay, compensation, and all other benefits." 5 C.F.R. § 1201.115(b)(2).

² Although the agency referred to the appellant's entitlement to back pay in its Declaration of Compliance, our finding is based on the agency's failure to provide interim relief (which is owed from the date of issuance of the initial decision), rather than back pay (which is calculated from the effective date of the removal action).

Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. This is the

final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

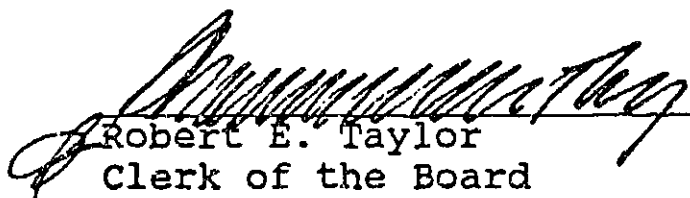
If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board